



## **The Supreme Court's 2021-22 Term: *The Far Right's Goals Within Reach***

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### **Introduction**

The Supreme Court term beginning in October 2021 is likely to be among history's most notable; indeed, we have never started a Supreme Court term with the Far Right so close to achieving so many of its key goals. This term is a bracing reminder of why Donald Trump and Senate Republicans broke nearly every rule in the book to pack the Court with ideological extremists who would regularly rule for corporations, and those with political power and wealth, over the rights and interests of everyday Americans.

The result of this openly partisan rightward push is a Court whose legitimacy has become questionable, to say the least. Neil Gorsuch is on the Court only because of the unprecedented decision by Republicans to deny President Obama a chance to fill a vacancy that opened nearly a year before he left office. Brett Kavanaugh's confirmation process was infected with [a corruption so deep yet so blatant](#) that most Americans in the era before Trump would have thought it impossible. Amy Barrett was rushed onto the Court by Republicans while Americans were already voting on whether to replace the president who appointed her, in a 180-degree turn from the standard they applied when a Democrat was president.

To name just a few examples, Trump justices have provided the votes for the Court to: [gut the Voting Rights Act](#) and empower their fellow Republicans to subvert our elections; [allow hyper-partisan gerrymandering schemes](#) that subvert democracy; [give businesses a constitutional weapon](#) to challenge ordinary health and safety inspections; [undermine precedents](#) upholding the ability of federal agencies to adopt vital health and safety regulations; and turn the First Amendment into a weapon to [harm unions](#). In just the short time since the previous term ended in July, they have [blocked the Biden administration's modified temporary eviction ban](#) and [allowed Texas's unquestionably unconstitutional abortion ban to go into effect](#).

The far-right majority's decisions have been so partisan and so damaging that [serious reform is needed to save our democracy](#): People For has called for additional seats on the Supreme Court, term limits for justices, mandatory ethical and other transparency standards for the Court, and reform of the notorious "shadow docket."

As discussed below, during the upcoming term, the justices will consider more cases that could do enormous harm to our rights and liberties. Based just on the cases they have already decided to hear, the justices may very well:

- end any meaningful constitutional right to abortion care;
- force states to fund private religious education;
- uphold a criminal conviction despite an acknowledged constitutional violation;
- prevent victims of a government anti-Muslim spying operation from presenting their case in court;
- declare a constitutional right to carry firearms in public places;
- insulate immigration officials' decisions from judicial review;
- limit the usefulness of federal laws protecting people with disabilities; and
- set back legal equality for residents of Puerto Rico.

## The Right to Abortion Care

The Supreme Court will be deciding at least one and likely two abortion cases of enormous importance this term, easily the most important since its groundbreaking decision in *Roe v. Wade* nearly half a century ago first recognized the constitutional right to abortion.

***Dobbs v. Jackson Women's Health (Mississippi Abortion Ban)***: The anti-abortion activists who fought to get Donald Trump's most extreme judicial nominees confirmed got a troubling return on their investment in May when the Supreme Court announced it would hear *Dobbs v. Jackson Women's Health*, a case generated as a mechanism for the far-right justices to rewrite the Constitution and eliminate a person's right to have an abortion.

At issue is a Mississippi law that bans abortion after 15 weeks "except in a medical emergency or in the case of a severe fetal abnormality." Fifteen weeks is before fetal viability. As even the extremely conservative Fifth Circuit recognized when it held the law unconstitutional:

In an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability. ... The law at issue is a ban. Thus, we affirm the district court's invalidation of the law ...

[As Right Wing Watch's Peter Montgomery has reported](#), the Mississippi law being challenged was "based on model legislation promoted by the religious-right legal group Alliance Defending Freedom as part of its plan to 'eradicate' *Roe v. Wade*." The [Center for Reproductive Rights](#) has been in court litigating against the law since its passage, and it will be arguing the case before the Supreme Court this term.

As a presidential candidate, Trump had promised that his nominees would overrule *Roe v. Wade*. [Neil Gorsuch and Brett Kavanaugh have made their anti-abortion agenda clear](#) since being confirmed, and [Amy Barrett's opposition to abortion rights](#) was one of the main reasons she was



nominated to fill the vacancy left by Justice Ruth Bader Ginsburg's death and was rushed through confirmation while the presidential election was taking place.

It is alarming that the conservative justices, clearly feeling their oats, have chosen to hear this case. There is simply no way to uphold Mississippi's law without dismantling the core holding of *Roe v. Wade* recognizing the constitutional right to decide for oneself whether to continue a pregnancy.

In case that message had not gotten through, the Court made it clearer by limiting the legal issues it wants the parties to address to just one of the three presented by Mississippi. The Court did not grant certiorari on the limited issue of how much authority lower courts have to ask whether a state's explanation for abortion restrictions is simply pretext to get around longstanding precedent recognizing abortion rights. Instead, it told the parties to address a question that does not presume the ongoing validity of those precedents in the first place: whether states ever have the authority to ban abortion before viability.

A ruling that upholds Mississippi's ban and answers yes to this question would essentially end the constitutional right to abortion as we have known it, even if the conservative justices craftily avoid the specific words "*Roe* is overruled" in an effort to avoid negative headlines just a few months before the 2022 midterm elections.

Oral arguments are scheduled for December 1.

***Whole Woman's Health v. Jackson* (Texas "Bounty Hunter" Abortion Ban):** In case there was anyone left thinking the far-right justices put the Constitution before their own political beliefs, allowing [Texas's indisputably unconstitutional abortion ban](#) to go into effect should have disabused anyone of that notion. The law prohibits abortion after the sixth week of pregnancy, before many people even know they're pregnant. But it is not a criminal law enforced by state officials. Instead, the new law deputizes private citizens to sue anyone who performs an abortion – or who helps someone access abortion care, however tangentially – with penalties of at least \$10,000 that go to the bounty hunter. The law forces people in Texas to live in a constant state of fear, unsure of whom they can trust, knowing that they could be hauled into court and financially ruined for exercising a constitutional right or participating in any way to help another exercise that right.

Not even that law's advocates have argued that the underlying ban is constitutional under Supreme Court precedent. Instead, anti-abortion forces crafted a law carefully designed to circumvent judicial review altogether. Specifically, by creating a law where private individuals rather than state government officials are empowered to violate people's constitutional rights, Texas set out to create a scenario in which abortion rights advocates would not have anyone to sue to prevent the law from going into effect.



This deeply cynical assault on the Constitution can't work without the active collaboration of extreme ideologues on the federal bench committed to upholding far-right usurpations of power without regard to rule of law. Unfortunately, Trump's Supreme Court justices and circuit court judges are numerous enough to command lawless majorities on their respective courts. When the law was first challenged and shortly before it went into effect, the parties were scheduled to argue their case before a federal district judge—until the Fifth Circuit inexplicably stepped in and directed the district court [not to even hold a hearing](#) on the matter. Even more remarkably, they gave no explanation for this astonishing ruling, which was made possible with the votes of two of Trump's judges. This lawless decision was appealed to the Supreme Court, with abortion rights advocates asking them to block the law from going into effect as scheduled on September 1. But that day came and went, and the law went into effect.

Finally, on September 2, a sharply divided 5-4 Court released a one-paragraph order denying the motion. [Trump's justices – Gorsuch, Kavanaugh, and Barrett – joined Clarence Thomas and Samuel Alito to make the majority](#) in *Whole Woman's Health v. Jackson*. Exactly as their fellow Republicans in the Texas legislature and anti-abortion movement had hoped, they cited “complex and novel antecedent procedural questions” that they claimed abortion rights advocates had failed to address.

This was a bridge too far even for Chief Justice Roberts, who wrote in dissent that the proper course would have been to temporarily stop the law from going into effect while the lower courts “consider whether a state can avoid responsibility for its laws” as Texas is trying to do. The three remaining moderate justices were far more critical of the majority in their own dissents. For instance, Justice Sonia Sotomayor called the Texas law a “flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny,” adding that the majority's willingness to let it go into effect was “stunning.” Justice Elena Kagan focused on how this typified the increasing use of the “shadow docket” to decide monumental legal questions without oral argument and without adequate explanation.

Individuals and organizations in Texas continue their litigation efforts against the law. In fact, a number have already [asked](#) that the Supreme Court consider the Texas case on an expedited schedule that would allow oral argument before the end of the year. In addition, the Justice Department has sued Texas for depriving people in the state of their constitutional rights. And a San Antonio doctor who said he provided abortion care in defiance of the law [has been sued](#) under the Texas law by individuals who oppose the law and want to see it tested in court. One way or another, this law will be before the justices again.

***Cameron v. EMW Women’s Surgical Center* (state AG’s effort to appeal even after the state accepts its loss in court):** This case comes in the context of an unconstitutional abortion restriction, but the issue before the Court is who can appeal the state’s loss in the lower court. When the Kentucky official defending the law decided not to appeal the state’s loss at the Sixth Circuit, the state attorney general unsuccessfully sought to intervene and continue the litigation. The Supreme Court will now consider whether the Kentucky AG has a right to intervene, but the justices are not expected to address the abortion restriction that the litigation was about.

Oral arguments are scheduled for October 12.

## Church-State Separation and Religious Liberty

***Carson v. Makin* (State Funding of Religious Education):** For many decades, the Far Right has shown great hostility to one of the cornerstone protections of the U.S. Constitution: the wall of separation between church and state that helps safeguard true religious freedom. As the Supreme Court has moved increasingly rightward, its cases have reflected the same hostility, with longstanding protections set aside. In *Carson v. Makin*, parties encouraged by this shift are asking the justices to take another step away from the longtime understanding of the First Amendment and force Maine to subsidize private religious education.

Maine is a primarily rural state, and many school districts do not have public high schools. In those areas, the state effectively uses private schools to deliver a public high school education to students. Maine has a compelling interest in making sure that children receive an education essentially the same as what they would receive in a public school. To avoid funding explicitly religious activity that is not consistent with a free public education and the state’s constitution, the state does not provide funding for sectarian schools that would use the money for religious education. The state is being sued by parents who want state funding to send their children to religious school.

This is the latest in a line of cases that reframes traditional church-state separation as a violation of the Free Exercise Clause and of the Equal Protection Clause. In the 2017 *Trinity Lutheran v. Comer* case, the Court ruled that a state’s grant program for organizations to improve their playgrounds cannot exclude churches even though the state constitution prohibits funding churches, because that constitutes discrimination on the basis of the church’s religious identity or “status.” But the case did not examine whether the playground (and hence the funds) might be used for religious purposes.

The Court went further in a 5-4 ruling in *Espinoza v. Montana Department of Revenue*, concerning a Montana program that gave a tax credit to individuals for contributions to an entity



that provided scholarships for qualifying private schools. Since the Montana constitution prohibits state funding of sectarian schools, they were not considered as qualifying schools. But the chief justice’s majority opinion classified this as based solely on the schools’ “status” as religious entities and therefore indistinguishable from a playground used for non-religious purposes. The majority eroded the Establishment Clause but still did not squarely address the issue of funds denied not because of status but because the state knows those funds would be used for religious purposes.

In the current case, Maine makes clear to the Court that it will fund religious organizations that are willing to provide children a non-sectarian education. Thus, it is not an entity’s “status” as a religious institution that triggers the denial of state funds, but the proposed use of those funds for religious education.

The plaintiffs in the case argue there is no distinction between religious “status” and religious “use,” citing a concurrence by Justice Gorsuch in the *Espinoza* case stating that the Free Exercise Clause protects not just the right to hold religious beliefs (status), but to act on them. So, citing the groundwork laid in *Trinity Lutheran* and *Espinoza*, they claim that Maine is violating their Free Exercise rights and denying them Equal Protection of the laws regardless of whether the school plans to use the government funds for religious instruction. By the end of the term, we may find out if a majority will adopt that position. If so, they will do grave harm to church-state separation and the ability of states to provide additional protection for such religious liberty to their residents.

Oral arguments are scheduled for December 8.

***Ramirez v. Collier (Restrictions on Clergy During Executions):*** John Ramirez was found guilty of capital murder in a Texas court and sentenced to die by lethal injection. He asked prison officials to allow his spiritual advisor, Pastor Dana Moore, to be present in the execution chamber during the execution, a request that Texas officials granted. However, officials denied his request that Moore be allowed to pray audibly while Ramirez is being executed, and to physically touch him while he is dying to confer ministrations and a spiritual blessing upon him. Ramirez asserts that these actions would “assist his passing from life to death” and “guide his path to the afterlife.” He sued, arguing that the state was infringing his right to free exercise of religion in violation of the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

RLUIPA – a federal law analogous to the Religious Freedom Restoration Act that applies to people in state prisons – provides much greater protection to religious exercise than the First Amendment. Under RLUIPA, officials cannot substantially burden a prisoner’s religious exercise unless it is the least restrictive means to serving a compelling government interest. Ramirez notes that RLUIPA defines “religious exercise” broadly, and that the receipt of audible prayer and pastoral touching upon death are clearly examples of religious exercise triggering



strict scrutiny. Moreover, he argues that neither audible prayer nor the laying of hands would interfere with state officials' work in executing him, so that Texas is not following the least restrictive means of serving its interests. The district court ruled against Ramirez, as did a divided panel of the Fifth Circuit. But the Supreme Court stayed the execution and stated that it will decide the merits of the case.

Texas suggests Ramirez's expressed desire to be touched is a way to delay the execution. He had filed an earlier suit when Texas initially refused to allow Pastor Moore in the chamber at all, and at that time he told the court that Moore would not need to touch him. Texas also argues that it is not forcing Ramirez to do anything that seriously violates his religious beliefs, and that RLUIPA does not require the government to "accede to his every religious demand." Therefore, according to Texas, it is not required to show that its restrictions on the pastor are the least restrictive way to serve its compelling interest in prison security. As an indication that it would meet that test if it had to, the state notes that Ramirez has not cited any other jurisdiction in the U.S. that makes the religious accommodations he is requesting.

The Supreme Court has issued several rulings on the presence of clergy during an execution, but it has done so through its so-called shadow docket, without benefit of oral argument or full explanations. This has left lower courts guessing. Depending on how the Court rules in this case, it may provide some better guidance.

Oral arguments are scheduled for November 1.

## The Criminal Justice System

***Brown v. Davenport (Man Convicted After Being Forced to Wear Shackles in the Courtroom):*** As always, the justices will be considering a number of cases involving the criminal justice system. One case that stands out involves Ervine Lee Davenport, who was convicted in Michigan state court of the murder of Annette White. However, the fairness and constitutionality of the proceeding was severely compromised by the prosecution's forcing him to wear shackles visible to jurors during the trial. There was no "on the record" justification given by the state trial judge. Davenport sought to persuade the jury that he had acted in self defense when White attacked him with a box cutter, but the shackles portrayed him as a dangerously violent man who had to be restrained even in a courtroom. After exhausting his state appeals, he went to federal court and argued that his conviction should be overturned.

The federal district court upheld the conviction, holding that the jury would have convicted him even if they had not seen the shackles, so the constitutional violation was “harmless error.” The Sixth Circuit reversed the lower court, [over the dissent of Trump judge Chad Readler](#), and ordered him released from prison. Michigan asked the Supreme Court to stay the Sixth Circuit’s decision, which the justices did without explanation (and over Sotomayor’s objection) until they can fully consider the state’s appeal.

Oral arguments are scheduled for October 5.

## Abuse of Government Power

***FBI v. Fazaga (State Secret Doctrine)***: American Muslims sued the FBI for illegally spying on them because of their religion. The question in the case is whether the case should be dismissed upon the federal government’s invocation of “state secrets” that would allegedly be revealed if the case is allowed to proceed.

In 2006-2007, an FBI informant allegedly infiltrated the Muslim community in Southern California and gathered detailed information about hundreds of people’s backgrounds, religious beliefs, political views, and other private matters in what was called “Operation Flex.” This included hundreds of hours of video recordings of the interiors of mosques, homes, businesses, and associations, as well as thousands of hours of audio recordings of conversations, public discussion groups, classes, and lectures. Several of the targets filed a class action lawsuit alleging unconstitutional searches (“surveillance claims”) and anti-Muslim discrimination (“religion claims”).

The district court judge dismissed almost all of the claims without a trial, based on something called the state secrets privilege, which was established by the Supreme Court in a 1953 case called *Reynolds v. United States*. The judge did so on the basis of the government’s claim that moving forward could reveal classified information and threaten national security. In 2019, however, a unanimous three-judge Ninth Circuit panel reversed the lower court, ruling that the claims could proceed, but with special processes set forth in the Foreign Intelligence Surveillance Act (FISA) to protect national security.

In 2020, the circuit as a whole chose to let that ruling stand, with Judge Marsha Berzon explaining that the state secrets privilege is not “a magic wand that the Executive may wave to remove certain information from litigation or, if necessary, end the case.” The decision came [over the dissent of eight Trump judges](#) and two George W. Bush judges, who accused the panel of violating the Constitution’s separation of powers by second-guessing the executive branch’s ability to protect classified information.





The Supreme Court will now determine if the targets of a significant and potentially unlawful surveillance of a large Muslim community will have a way to vindicate their rights in a court of law.

Oral arguments are scheduled for November 8.

## Gun Safety

### ***New York State Rifle & Pistol Association Inc. v. Bruen (Carrying Guns Outside the Home):***

The Court that more than a decade ago in the *Heller* and *McDonald* cases transformed the Second Amendment into a personal right to own a gun unrelated to military service is poised to increase the damage this term. In *New York State Rifle & Pistol Association v. Bruen*, the Court will consider a New York law that requires an individual to show “proper cause” in order to get a license to carry a concealed firearm. Proper causes include a specific, individualized, non-speculative belief that a firearm is needed for self-defense.

Justice Scalia’s majority opinion in *Heller* found that the District of Columbia’s gun restrictions on firearms in the home infringed the core Second Amendment right to defend oneself in one’s home. But he stressed that the Court was not undermining longstanding gun safety measures, noting that the right to bear arms is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” The Court also noted with approval that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” Accepting the *Heller* Court’s word on the limited nature of its ruling, a number of lower courts have upheld regulations on firearms, as did the Second Circuit in this very case.

But in the years since *Heller*, the Court has gained new justices who are hostile to reasonable regulations to prevent gun violence. In April 2020, the Court dismissed a challenge to a different New York gun safety law as moot because the state had repealed the law in question. But in a bitter dissent, Justice Alito (joined by Justice Gorsuch) criticized lower courts for upholding gun violence measures that (in his opinion) did not comply with *Heller*. Justice Kavanaugh wrote separately to say he shared Justice Alito’s “concern that some federal and state courts may not be properly applying *Heller*.”

Two months later, in June of 2020, the Court unexpectedly denied review in a number of Second Amendment cases after having considered them at six consecutive conferences without action. Justice Thomas (joined by Justice Kavanaugh) dissented from one of those denials, urging the Court to “acknowledge that the Second Amendment protects the right to carry in public.”



But soon after that, the balance on the Court shifted when Justice Ginsburg, who had dissented in *Heller*, was replaced by Justice Barrett. On the Seventh Circuit, then-Judge Barrett had [tried in dissent](#) to bar the application of a law banning people convicted of felonies from possessing firearms. Like many other far-right judges, [including Justice Alito](#), she complained that the Second Amendment was being treated as a “second class right.”

In defending its law, New York notes that public-carry laws existed during all the historical periods that the Supreme Court previously identified as significant to understanding the “pre-existing right” that the majority ruled was codified in the Second Amendment. In contrast, it argues, the unconstrained right to public-carry pushed by the New York gun organization “has no antecedent in our Nation’s history.” If the Court reverses the Second Circuit in this case, there is great concern that the Court may go even further and invalidate even more accepted gun safety laws in the future.

Oral arguments are scheduled for November 3.

## The Rights of Immigrants

***Patel v. Garland (Insulating Immigration Officials’ Decisions from Judicial Review)***: This is an appeal of an Eleventh Circuit opinion made possible by Trump judges significantly curtailing courts’ ability to review the decisions of immigration officials even when they are based on conclusions about factual matters unsupported by the record. The abuse of power this would allow is so extreme that the United States urged the Court to hear Pankajkumar Patel’s appeal and correct the circuit court’s misinterpretation of the law.

An immigration judge (IJ) and the Board of Immigration Appeals (BIA) denied Indian citizen Pankajkumar Patel’s petition to change his immigration status so that he could remain in the country based on a labor certification. This type of relief is generally discretionary under immigration law. In Patel’s case, officials concluded he was ineligible for relief because when he had applied for a Georgia driver’s license, Patel had incorrectly checked a box that said he was a U.S. citizen. He testified that it had been a mistake, but immigration officials concluded it was intentional and that this made him inadmissible. Patel appealed to the Eleventh Circuit, arguing that the record did not support the officials’ factual conclusion.

In an *en banc* decision joined by all five participating Trump judges—Kevin Newsom, Elizabeth Branch, Britt Grant, Robert Luck, and Barbara Lagoa—a majority of the Eleventh Circuit held that Patel cannot appeal that issue to the courts. They ruled that when immigration officials consider discretionary relief in a case such as Patel’s, their factual conclusions can’t be reviewed by courts to make sure they are not contradicted by the record. They based their ruling on an interpretation of the 2005 Real ID Act, in which Congress took away courts’ jurisdiction in



certain categories of cases to hear appeals of denials of “discretionary relief”—a term the majority interpreted broadly in order to reach its conclusion.

Judge Beverly Martin wrote a dissenting opinion, joined by four other judges on the court. Martin criticized the majority for paying “scant attention” to the two “foundational canons of statutory construction” for statutes such as the Real ID Act. The first was the “longstanding presumption in favor of judicial review of administrative actions.” And second was the “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [non-citizen].” Judge Martin proceeded to apply those canons in a careful analysis of the statute, explaining that *eligibility* for discretionary relief is distinct from the favorable *exercise* of that discretion. Using “the proper canons,” she continued, the Real ID Act “cannot properly be read to strip [the circuit] court of jurisdiction to review a finding of fact that is contradicted by the record.”

Judge Martin warned of the dangerous consequences of the majority’s interpretation. By sweeping all factual findings and discretionary decisions into the statutory provision denying judicial review, the majority “gives the government the ability to insulate agency findings from judicial review, solely by the way it charges a case.”

If the government charges a noncitizen as removable for being inadmissible, the court can review that decision in its entirety. But if the government does not charge the noncitizen as removable for being inadmissible, and the immigration judge instead deems the immigrant ineligible for discretionary relief because he is inadmissible, the factual basis for the IJ’s decision becomes unreviewable. In both cases, the IJ has found the noncitizen inadmissible, but the government’s charging decision alone will have determined the scope of judicial review.

Although the United States is the defendant in Patel’s appeal, the Justice Department argues that the Eleventh Circuit’s interpretation of the law must be corrected. The Biden administration does not argue that Patel’s petition should have been granted, but it does argue that he has the right to judicial review of that decision.

Oral arguments are scheduled for December 6.

## Rights of People With Disabilities

***CVS Pharmacy v. Doe (Disparate Impact in Disability Discrimination):*** This case involves people living with HIV/AIDS who claim that their employer-provided prescription drug insurance plan provides a benefit that is unavailable to them because of their disability.

Under the plan, the only way for anyone to enjoy in-network prices for prescription drugs is to get them through Caremark, which either mails them to the patient or to a local CVS for pickup.



Several individuals living with HIV/AIDS claim that this system deprives them of vital one-on-one counseling with pharmacists who can review all of their prescriptions for potential side effects and adverse interactions with the many (and frequently changing) assortment of medications needed to treat HIV/AIDS. In order to have quality pharmaceutical care, they have to go “out of network” and pay thousands of dollars more per month for their medications.

The plaintiffs sued Caremark and CVS in a class action, arguing that they and other people living with HIV/AIDS have been relegated to an inferior and unequal prescription drug benefit solely because of their disability in violation of the federal Rehabilitation Act (RA) and the Affordable Care Act (ACA). This has denied them “meaningful access” to a benefit available to others, the test established by the Supreme Court in a 1985 case in which the justices “assumed without deciding” that the RA prohibits at least some conduct with a disparate impact upon people with disabilities. CVS argues that its policy is facially neutral, that its disparate impact on people living with HIV/AIDS does not violate the Rehabilitation Act, and that the Court should explicitly reject the possibility it left open in 1985 that the statute allows for at least some disparate impact claims. The Ninth Circuit ruled that the plaintiffs should be allowed to at least go forward with their case, but the Supreme Court decided to review that ruling.

Oral arguments are scheduled for December 7.

***Cummings v. Premier Rehab Keller (Damages for Emotional Distress in Disability Discrimination Cases)***: Jane Cummings has been deaf from birth, and her primary language is American Sign Language. She went to Premier Rehab Keller to treat her chronic back pain. The company did not provide her with an ASL interpreter when requested, and they sent her to another facility. Alleging discrimination on the basis of her disability, she sued under the RA and ACA. Among other things, she sued to collect damages for emotional distress. But the district court, affirmed by the Fifth Circuit, ruled that such damages are unavailable under those two statutes.

As a group of disability organizations noted in an amicus brief, the harm caused by disability discrimination is often not monetary in nature but emotional: Congress set out to address the humiliations that were routinely visited upon people with disabilities. Damages for emotional distress are an important remedy and help give force to the congressional prohibition against discrimination.

Oral arguments are scheduled for November 30.

## Rights of Puerto Rican Americans



***United States v. Vaello-Madero (Social Security Disability Benefits)***: This case poses the question of whether it is constitutional to exclude people in Puerto Rico from eligibility for federal Supplemental Security Income (SSI) benefits.

SSI payments help support low-income individuals who are older than sixty-five, blind, or disabled. Under the Social Security Act, SSI benefits are available to residents of any of the 50 states, the District of Columbia, and the Northern Mariana Islands—but not to people living in Puerto Rico. When José Luis Vaello-Madero moved from New York to Puerto Rico, his SSI benefits were cut off, and he sued, citing a violation of his rights under the Equal Protection Clause.

The Supreme Court has held that Congress is generally allowed to treat territories differently from states. In defending the law, the federal government notes that residents of Puerto Rico are generally exempt from most federal taxes. It argues that Congress could rationally conclude that a jurisdiction that makes a reduced contribution to the general federal treasury should receive a reduced share of the benefits funded by the general treasury.

Vaello-Madero believes that “rational basis” is too lenient a standard. Because Puerto Rico residents are politically powerless and have suffered a history of discrimination based on their race and ancestry, he argues, their differential treatment triggers (and fails to meet) the highest level of judicial scrutiny: The law must be narrowly tailored to serve a compelling interest.

The Supreme Court’s decision could not just resolve the specific question about the SSI program but could also affect the extent to which Puerto Ricans can be treated worse than other U.S. citizens. It may also provide an opportunity for the rest of the nation to focus on our historical and modern treatment of Puerto Rico.

Oral arguments are scheduled for November 9.

## Conclusion

Based on the cases the Supreme Court will be hearing this term, the 6-3 far-right majority could rewrite the Constitution and our laws to take critical rights away from people in the United States. We may very well see the seismic shift in abortion rights, church-state separation, and the Second Amendment that the far right has worked for decades to effect. The justices could make it easier for government officials to abuse their power to impose unfair trials, target Muslim communities with spying operations, and unfairly deport immigrants. With Justice Barrett giving conservatives a sixth vote, Chief Justice Roberts and Justice Kavanaugh have become the “swing” votes, the role once filled by the moderate Justice Sandra Day O’Connor. The fact that the Court’s center has swung so wildly to the right shows how successful Republicans have been in changing the nation’s judiciary.



The far-right conservative justices have awakened Americans to just how important the Supreme Court is in protecting our health, our rights, and our lives. The 2020 election saw a reversal from the previous trend, in that the Supreme Court as an issue [motivated Biden voters](#) more than Trump voters.

Since Americans fired Donald Trump last year, we have seen President Biden and Senate Democrats work overtime to begin to [repair the damage](#) done to our entire federal judiciary during the previous four years, even as the harmful effects of Trump's lifetime appointments continue past his presidency. It is a project that will take years and require a great deal of energy and commitment, and we will do what is necessary for as long as it takes. Nothing less than our fundamental rights under the law are at stake.